situations like this one. *See* Hogan Pet. at n.8, 9. In each of these cases, the courts considered issues first raised in supplemental briefs. Although these courts did not *explicitly* decline to apply the procedural bar rule, their mere analysis of *Booker*, *Blakely* and *Apprendi* issues raised in supplemental briefs demonstrates that they declined to apply the anomalous Eleventh Circuit rule.

The bottom line is each circuit applies *Booker / Blakely* issues even where the defendant raises the claim after his initial brief has been filed. Therefore, the Eleventh Circuit's rigid application of its procedural default rule[7] has been almost universally rejected.

d. As for the policy considerations raised by Hogan (at pgs. 22-23) – that lawyers will either raise every conceivable claim or will simply file an *Anders* brief – Respondent does not disagree, saying that "the same could be said of any procedural default rule." (Response at p. 17). Respondent's cavalier contention ignores the reality of the overburdened courts of appeal. Only the Eleventh Circuit seems eager to deal with this avalanche of frivolous claims that now must be raised in each defendant's initial brief. *See, e.g., United States v. Pipkins*, 02-14306, 2005 WL 1421449 (11th Cir. June 20, 2005) ("Even if our precedent at the time foreclosed their argument, the defendants still had to raise this issue in their initial brief and assert that our precedent was wrongly decided in order for us to consider it. It is through this process that the law evolves.").

---

[7] The Eleventh Circuit has held firm to the rule, as seen recently in *United States v. Levy*, No. 01-17133, 2005 WL ___ (11th Cir. July 12, 2005).

CONCLUSION

We respectfully submit that Judge Tjoflat is right in that the Supreme Court will "hopefully . . . correct this [anomolous] practice" in the Eleventh Circuit. *Vanorden*, 2005 WL 1531151 at *16. As he explains: "The upshot of our rule, therefore, is that a Supreme Court decision that we are directed to apply retroactively to *all* cases still pending on direct review, will not apply at all to cases on direct review like this one." *Id.* at 15. That hardly seems fair. We respectfully request, therefore, that this Court either hear this case on the merits or grant the petition, vacate the decision below, and remand for further consideration, notwithstanding the Eleventh Circuit's procedural default rule.

Respectfully submitted,

DAVID OSCAR MARKUS
HIRSCH & MARKUS, LLP
Suite 1200, Datran II
9130 S. Dadeland Blvd.
Miami, FL 33156
Tel: (305) 670-0077
Fax: (305) 670-7003
www.hirschmarkus.com

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 02-10368

GARLAND HOGAN,

Appellant,

vs.

UNITED STATES
OF AMERICA,

Appellee. /

APPELLANT GARLAND HOGAN'S MOTION TO ADOPT ALL MOTIONS, PETITIONS AND PLEADINGS FILED BY CO-APPELLANTS

Appellant Garland Hogan, ("Hogan") moves this Court to enter an Order granting Hogan's Motion to adopt All Motions, Petitions And Pleadings filed by Co-Appellants. As grounds therefor, Hogan states as follows:

1. Because of the complex nature of this case including voluminous trial transcripts, multiple appellants, and numerous post-trial motions, undersigned counsel does not wish to further burden this court with duplicate pleadings. Each issue, argument and authority is applicable to Hogan. All have been addressed by Co-Appellants.

2. Further pleadings by Hogan would repeat issues already covered by Co-Appellants. Therefore, in an attempt to minimize duplication and otherwise streamline these proceedings, undersigned counsel respectfully requests

this Court to enter an Order which allows Hogan to adopt any and all pleadings filed by his Co-Appellants.

3. In so doing, Hogan specifically requests leave to adopt all motions filed to date including, but not limited to:

Motions By Co-Appellant Lewis

(a) Lewis' Motion for Leave to File Supplemental Brief As To Sentencing Enhancements Pursuant to *Blakely v. Washington*, filed on or about June 29, 2004.

(b) Petition For Rehearing En Banc; To Remand This Case For Resentencing In Accordance With *Blakely v. United States*; And/Or, To Allow Supplemental Briefing.

Motion By Co-Appellant Pierce

Co-Appellant Piece's Petition for Rehearing filed on or about July 7, 2004.

Motion By Co-Appellant Tirado

Co-Appellant Tirado's Motion To: (1) Rehear And Reverse Tirado's Conviction And Sentence; (2) To Remand this Case for Resentencing in Accordance With *Blakely v. Washington*; Or, (3) Allow Supplemental Briefing thereon, filed on or about July 9, 2004.

Motions By Co-Appellant Balsam

(a) Co-Appellant Balsam's Petition For Rehearing (or Hearing) En Banc.

(b) Co-Appellant Balsam's Motion To Adopt All Motions, Petitions And Pleadings of Defendants.

4. Because undersigned counsel has not received copies of all pleadings filed by Co-Appellants, it is not possible to point out every pleading Hogan seeks to adopt. If, however, this Court grants Hogan's Motion to adopt *all* pleadings filed by co-Appellants (including all pleadings, motions and petitions filed to date plus those which have yet to be filed) the issue will be resolved without need for subsequent motions.

WHEREFORE, Appellant Garland Hogan moves this Court to enter an order granting Appellant Garland Hogan's Motion To Adopt All Motions, Petitions and Pleadings of Co-Appellants.

Respectfully submitted,

JORDEN BURT, LLP
777 Brickell Avenue
Suite 500
Miami, Florida 33131
Tel. No. (305) 371-2600
Fax. No. (305) 372-9928

By: /s/ Janice Burton Sharpstein
Janice Burton Sharpstein
Florida Bar No.205362

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant Garland Hogan's Motion To Adopt All Motions, Petitions And Pleadings Filed By Co-Appellants was MAILED and FAXED on this 21 day of July, 2004, to the following:

Jeanne Mullenhoff
Assistant United States Attorney
Office of the United States Attorney
99 N.E. 4th Street,
Miami, Florida 33401
fax. no. (305) 536-7214

Susan Martin, Esq.
P.O. Box 330055
Miami, Florida 33233
fax. no. 305-665-6534